Chang et al v. Virgin Mobile USA LLC et al Doc. 27

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§	
Plaintiffs,	§	CA No. 3:07-cv-1767
V.	§	
VIRGIN MOBILE PTY LTD.,	§	
Defendant.	§	

DEFENDANT VIRGIN MOBILE PTY LTD.'S MOTION
TO DISMISS AND SUPPORTING BRIEF

Lisa H. Meyerhoff
Texas Bar No. 14000255
Email: Lisa.Meyerhoff@Bakernet.com
BAKER & McKENZIE LLP
2300 Trammell Crow Tower
2001 Ross Avenue
Dallas, TX 75201
Telephone: 214 978 3000
Facsimile: 214 978 3099

Myall S. Hawkins
Texas Bar No. 09250320
Email: Myall.Hawkins@Bakernet.com
Todd Y. Brandt
Texas Bar No. 24027051
Email: Todd.Brandt@Bakernet.com
Tan Pham
Texas Bar No. 24046628
Email: Tan.Pham@Bakernet.com
BAKER & McKENZIE LLP
711 Louisiana, Suite 3400
Houston, Texas 77002
Telephone: 713 427 5000
Facsimile: 713 427 5099

ATTORNEYS FOR DEFENDANT
VIRGIN MOBILE PTY, LTD.

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TABLE OF CONTENTS

Page

I. SUMMARY 1

II. RELEVANT BACKGROUND FACTS 1

III. THE COURT LACKS PERSONAL JURISDICTION OVER FOREIGN DEFENDANT VIRGIN AUSTRALIA 3

- A. The Court Lacks General Jurisdiction Over Virgin Australia 4
  - 1. Virgin Australia conducts no business in the U.S. or Texas 4
  - 2. Virgin Australia's website establishes no general jurisdiction outside of Australia 5
- B. The Court Lacks Specific Jurisdiction Over Virgin Australia 6
  - 1. There were no Virgin Australia activities directed to Texas or the U.S 7
  - 2. There was no intentional tort alleged that meets the *Calder* "Effects" test for personal jurisdiction 8
  - 3. There was no breach of contract claim that would establish specific jurisdiction in Texas or the U.S 10
- C. Establishing Personal Jurisdiction Over Virgin Australia Will Offend Traditional Notions of Fair Play And Substantial Justice 11

IV. SERVICE OF PROCESS ON VIRGIN AUSTRALIA WAS IMPROPER 14

- A. The Texas Code Does Not Allow For Substituted Service On the Texas Secretary Of State 14
- B. The Federal Rules Do Not Allow For Substituted Service On The Texas Secretary Of State Or Service By Registered Mail 15

V. CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Alternative Delivery Solutions, Ind. v. Donnelley & Sons Co.,
2005 U.S. Dist. LEXIS 15949 (W.D. Tex. July 8, 2005) 15

Asahi Metal Indus. v. Superior Court of Cal.,
480 U.S. 102 (1987)..11, 12, 13

Bird v. Parsons,
289 F.3d 865 (6th Cir. 2002) 6

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985)) (emphasis added..6

Calder v. Jones,
465 U.S. 783 (1984)..8, 9

Central Freight Lines, Inc. v. APA Transp. Corp.,
322 F.3d 376 (5th Cir. 2003) 10

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984)..3, 4, 6

LCW Automotive Corp. v. Restivo Ent.,
2004 U.S. Dist. LEXIS 19290 (W.D. Tex. Sept. 24, 2004)..8

Loumar, Inc. v. Smith,
698 F.2d 759 (5th Cir. 1983) 8

Moncrief Oil v. Oao Gazprom,
481 F.3d 309 (5th Cir. 2007) 6, 9, 10

Panda Brandywine Corp. v. Panda Global Holdings,
253 F.3d 865 (5th Cir. 2001) 8, 9, 10

Panda Brandywine Corp. v. Panda Global Holdings,
2000 U.S. Dist. LEXIS 22714 (N.D. Tex. Sept. 15, 2000),
aff'd 253 F.3d 865 (5th Cir. 2001) 8

Perkins v. Benguet Consolidated Mining, Co.,
342 U.S. 437 (1952)..5

Revell v. Lidov,
317 F.3d 467 (5th Cir. 2002) 3, 4, 5, 6, 7, 8, 9

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 11, 12

FEDERAL STATUTES

Fed. R. Civ. P. 4(f) 14, 15, 16

Fed. R. Civ. P. 12(b)(2) 1, 3, 14, 16

Fed. R. Civ. P. 12(b)(5) 14

STATE STATUTES

Tex. Civ. Prac. & Rem. Code Ann. § 17.044(b) 14, 15

Pursuant to Fed. R. Civ. P. 12(b)(2) and (5), Defendant Virgin Mobile Pty Ltd. ("Virgin Australia") moves the Court to dismiss the instant lawsuit filed by Plaintiffs Susan Chang, as next of friend of Alison Chang ("Chang") and Justin Ho-Wee Wong ("Wong") (collectively "Plaintiffs"). In support of dismissal, Virgin Australia would show the Court as follows:

I. SUMMARY

- There is no conduct, let alone purposefully directed conduct, in the U.S. or Texas.
- There is no alleged foreign conduct that caused any U.S. or Texas injury.
- There is no performance or activity of the alleged contract in the U.S. or Texas.
- There has been no business solicited, transacted or entered in the U.S. or Texas.
- There is no office, employees, travel or bank accounts in the U.S. or Texas.
- Plaintiffs failed to properly serve Virgin Australia with process.

II. RELEVANT BACKGROUND FACTS

Virgin Australia was founded in 2000 as a joint venture between the Virgin Group, a British company, and Cable & Wireless Optus Pty Ltd. ("Optus"), an Australian company. APP 1.[1, 2] The Australian joint venture was established to provide a wide range of mobile phone products and services, including without limitation, prepaid and postpaid mobile phone service. APP 1. In August 2001, Optus became a wholly-owned subsidiary of Singapore Telecommunications Limited, a Singapore company, and it changed its name to SingTel Optus Pty Limited. In January 2006, Virgin Australia became a wholly-owned subsidiary of Optus. APP 1. Virgin Australia's only geographic area of operation is Australia, and it is further limited to the geographic scope of the Optus telecommunications network over which Virgin

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[1] Pursuant to Local Rule 7.1(i), Defendant has included the documentary evidence supporting its Motion in a separate Appendix. The pages of the Appendix are cited as "APP__."

[2] In the beginning of 2006, Optus bought out the Virgin Group's shares of the joint venture and became 100% owner of Virgin Australia. APP 1. That is, Virgin Australia is a wholly-owned subsidiary of Optus. *Id*.

Australia provides its services. APP 1-2. Moreover, it is Virgin Australia's policy (and Virgin Australia is only authorized) to sell its products only to those consumers within its domestic Australia coverage area. APP 1-2.

Since its inception, Virgin Australia has been known for its original and innovative advertising campaigns that have won a number of foreign advertising awards.[3] APP 2. In 2007, Virgin Australia launched its "Are You With Us Or What?" domestic Australia advertising campaign (the "2007 Campaign"). The 2007 Campaign was shown only in select Australian cities, such as Adelaide and Sydney. APP 2. Incorporated within the 2007 limited Campaign was a photograph of Chang obtained from Flickr's[4] worldwide-accessible website for publicly shared images. The image of Chang was apparently placed on Flickr's public site by Wong pursuant to a Creative Commons[5] Attribution 2.0 license agreement, where Wong intentionally selected and granted the most unrestricted use (including commercial use and no monetary payments), available to any worldwide user. APP 2. While the photograph of Chang was obtained from the world wide web, Virgin Australia never posted the photograph on its website or on any other website. APP 2.

Upon information and belief, the Australian image of Chang was photographed from an ad-shell ("billboard") affixed to a bus shelter in Adelaide, Australia, and then posted by a member of the Flickr online blogger community to the world wide web. APP 7 – 11. The image of Chang was fortuitously selected by Virgin Australia from the hundreds of millions of Flickr photographs publicly available on the Internet, including the thousands of photographs posted by Wong and dozens of photographs posted by Chang on Flickr pursuant to a Creative Commons license agreement. APP 12 - 45. In selecting the image of Chang from Flickr, Virgin Australia did not know where, how or why the image was created, the nationality of the individual in the image and/or what province, region or state she claimed as her residence.[6] APP 3. In actuality, the captured image of Chang could as easily been of a young adult in Europe or Asia as a high school student in North Texas.

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[3] *E.g.*, Cannes Lions International Advertising Festivals in 2004, 2005 and 2006.

[4] Flickr is a public and free photo sharing website owned by Yahoo.

[5] On November 27, 2007, Plaintiffs voluntarily dismissed Creative Commons Corp. from the lawsuit.

III. THE COURT LACKS PERSONAL JURISDICTION OVER FOREIGN DEFENDANT VIRGIN AUSTRALIA.

Pursuant to Fed. R. Civ. P. 12(b)(2), the Court should dismiss the lawsuit because the Court lacks personal jurisdiction over Virgin Australia. Generally, a court may exercise personal jurisdiction over a defendant as long as jurisdiction is pursuant to the long-arm statute of the forum state, and if exercising personal jurisdiction is consistent with the U.S. Constitution. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 412-13 (1984); *Revell v. Lidov*, 317 F.3d 467, 469-70 (5th Cir. 2002). Since Texas' Long-Arm Statute reaches as far as the 14th Amendment, the only question is whether exercising personal jurisdiction over Virgin Australia here would offend due process. *Id*. The 14th Amendment permits the exercise of personal jurisdiction if: (1) a non-resident defendant established "minimum contacts" with the forum state; and (2) the "exercise of personal jurisdiction does not offend 'traditional notions of fair play and substantial justice.'" *Helicopteros*, 466 U.S. at 412-13 (citing *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)); *Revell*, 317 F.3d at 470 (citations omitted).

A court may exercise personal jurisdiction over a foreign defendant based on general or specific jurisdiction. General jurisdiction is established when a "defendant's contacts with the forum state are unrelated to the cause of the action but are 'continuous and systematic.' Specific jurisdiction arises when the defendant's contacts with the forum 'arise from, or are directly related to, the cause of action.'" *Revell*, 317 F.3d at 470.

[6] The only information available from Wong's Flickr account regarding any of his photographs is a date stamp and short title for that particular photograph.

A. The Court Lacks General Jurisdiction Over Virgin Australia.

General jurisdiction may be established when there is evidence of a foreign company's "continuous and systematic" presence in the forum state. For example, if a company maintains an office, has bank accounts or engages in business in the forum state, general jurisdiction may be established. *See Helicopteros*, 466 U.S. at 414-15. The question of general jurisdiction is not whether the foreign defendant is "doing business *with* Texas," but rather is whether the foreign defendant is "doing business *in* Texas." *Revell*, 317 F.3d at 471 (emphasis in original).

1. Virgin Australia conducts no business in the U.S. or Texas.

Virgin Australia does not have any employees, and does not maintain any offices or facilities in the U.S., including in Texas. APP 3. Virgin Australia does not maintain any mailing address, phone number, or place of business in the U.S., including in Texas. APP 3. Virgin Australia does not own any bank accounts, or solicit, transact, engage or enter into any type of business in the U.S., including in Texas. APP 3. In fact, the only "Virgin Mobile" business in the U.S. is carried out by a "separately-organized and operated, distinct legal entity" that has an exclusive license to use the Virgin trademarks in the United States, Puerto Rico and the U.S. Virgin Islands - Virgin Mobile USA, LLC ("Virgin U.S."). APP 3, 51 - 63. As evidenced by Plaintiffs' voluntary dismissal of Virgin U.S. from this lawsuit, Virgin Australia and Virgin U.S. have **no** connections, either by business relationship or by parent company ownership. *See* APP 54.

Virgin Australia is not authorized to do business anywhere in the U.S., including in Texas. APP 3. Further, Virgin Australia has not entered into any contract, license, or agreement in Texas or with any Texas party. APP 3-4. Virgin Australia does not distribute or intend to distribute any of its products into the U.S., including in Texas. Based on the above, Virgin Australia has never sought to derive any income from Texas or from a Texas business entity.

APP 3-4. Further, no Virgin Australia employees have traveled to Texas for business reasons arising from their course of employment with, and/or duties for, Virgin Australia. APP 4.

The Fifth Circuit in *Revell* (*see infra)* referred to the U.S. Supreme Court's analysis in *Perkins v. Benguet Consolidated Mining, Co.*, 342 U.S. 437 (1952), regarding general jurisdiction. In *Perkins*, the U.S. Supreme Court identified the following factors supporting a finding of general personal jurisdiction over a foreign company: it was located in the forum state; had records maintained in the forum state; had meetings in the forum state; had bank accounts in the forum state; and all key business decisions were made in the forum state. *Id*. at 447-48. As discussed above, none of the factors supporting general jurisdiction are present for Virgin Australia.

2. Virgin Australia's website establishes no general jurisdiction outside of Australia.

Recently, the Fifth Circuit Court of Appeals commented on whether a mere website may establish general jurisdiction over a non-resident defendant. In *Revell v. Lidov*, the plaintiff, a Texas resident, sued a non-resident individual residing in Massachusetts and also sued Columbia University in New York on claims that the foreign defendants had defamed the plaintiff by posting an article on Columbia University's website. 317 F.3d at 468-69. In resolving the matter, the Fifth Circuit first looked to the *Zippo* "sliding scale" test of whether a website is "passive" or "interactive," *id*. at 470,[7] but noted that this sliding scale is "not well adapted to the general jurisdiction inquiry." *Id*. While a website may offer a "continuous presence everywhere in the world," such contacts are "not in any way '**substantial,**'" thereby rising to the level needed for general jurisdiction. *Id*. (emphasis added).

[7] The Fifth Circuit noted that if a website is "passive," it will **never** be sufficient to establish personal jurisdiction. *Id*. If a website engages in repeated online contacts, exercise of personal jurisdiction might be proper. *Id*. In between these two realms, personal jurisdiction may be established depending on the interactivity of the website. *Id*. That is, there must be at least a "bilateral information exchange" between the website and the visitor. *Id*.

The Fifth Circuit then turned to its sister court, the Sixth Circuit, which had recently found no general jurisdiction in a similar case, *Bird v. Parsons*, 289 F.3d 865 (6th Cir. 2002). The Fifth Circuit noted that in the *Bird* case, "the Sixth Circuit found Ohio courts lacked general jurisdiction over a non-resident business that registered domain names despite the fact that: (1) the defendant maintained a website open for commerce with Ohio residents and (2) over 4000 Ohio residents had in fact registered domain names with the defendant." *Id*. at 873-74.

Virgin Australia's actions do not even rise to the level of providing innocuous domain names to residents of Texas, let alone "substantial" contacts with Texas. While its Australia-hosted website is theoretically open for commerce with anyone in the world (due to the accessibility of websites), Virgin Australia has not solicited, transacted, received and/or entered into any type of contract to perform and/or be performed with U.S. or Texas residents that would be considered "substantial." *See Revell*, 317 F.3d at 471; *see also*, APP 3-4. Thus, the Court lacks general jurisdiction over Virgin Australia.

B. The Court Lacks Specific Jurisdiction Over Virgin Australia.

A court may exercise specific jurisdiction over a non-resident defendant when the suit arises out of, or is related to, the defendant's contact with the forum state. *Helicopteros*, 466 U.S. at 414 n. 8; *Revell*, 317 F.3d at 470. The non-resident defendant "must have **purposefully** directed [its] activities at residents of the forum, and the litigation results from alleged injuries arising out of or related to those activities." *Moncrief Oil v. Oao Gazprom*, 481 F.3d 309, 312 n. 2 (5th Cir. 2007) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)) (emphasis added). In this lawsuit, Plaintiffs allege invasion of privacy, libel, breach of contract, and copyright infringement.

1. There were no Virgin Australia activities directed to Texas or the U.S.

Virgin Australia did not purposefully direct any of its activities towards residents of Texas, or any where else in the U.S. In addition, Plaintiffs do not allege injuries arising out of any of Virgin Australia's activities in Australia. The only fortuitous connection with Texas (that would still not rise to the level of a specific contact and that was **unknown** to Virgin Australia) is Chang's and/or Wong's residences in Texas. However, their Texas residences are totally unrelated to the alleged actionable use and publication of the subject image in Australia, and their Texas residences do not rise to the level of a specific contact by Virgin Australia with Texas.

Virgin Australia is further distanced from Texas, both literally and figuratively, by the fact that the instant complaint arose only after a third party located 8,000+ miles away from Texas[8] took a photograph of the billboard at the situs of the alleged event - Australia. There was no specific contact by Virgin Australia in the forum state. The Fifth Circuit has confirmed that the first analytical step is to "look at **only** the contact out of which the cause of action arises." *Revell*, 317 F.3d at 472 (emphasis added). In this case, the contact was physically in Australia, where Virgin Australia exclusively advertises and where the subject photograph was displayed in bus shelters.

Virgin Australia's advertisement that incorporates the photograph of Alison Chang has never been distributed or otherwise authorized by Virgin Australia to be distributed in the U.S., including in Texas. APP 2. That is, all advertisements incorporating the photograph of Alison Chang were used **solely** in Australia, namely on ad-shells affixed to bus shelters in the major

[8] 8,583 miles from Dallas, Texas to Sydney, Australia is a representative distance between a major Texas city and a major Australian city.

metropolitan areas of Australia.[9] APP 2. Plaintiffs have no evidence supporting the requirement that Virgin Australia has availed itself of the privilege of conducting business in Texas, thereby invoking the benefits and protections of Texas law. Instead, Plaintiffs have only alleged that they are Texas residents, and that any harm caused by Virgin Australia was felt in Texas. The Fifth Circuit has affirmed this Court's prior ruling that mere conclusory allegations, even if true, "are nonetheless insufficient to establish a prima facie case for jurisdiction" over a non-resident defendant. *Panda Brandywine Corp. v. Panda Global Holdings*, 253 F.3d 865, 869 (5th Cir. 2001) (affirming *Panda Brandywine Corp. v. Panda Global Holdings,* 2000 U.S. Dist. LEXIS 22714 (N.D. Tex. Sept. 15, 2000, J. Fitzwater)).

2. There was no intentional tort alleged that meets the *Calder* "Effects" test for personal jurisdiction.

The Plaintiffs have alleged various intentional torts[10] in this lawsuit. The Court may use the "effects" test in *Calder v. Jones,* 465 U.S. 783, 789 (1984) to resolve the issue of personal jurisdiction. However, even under the "effects" test, this Court still lacks specific jurisdiction over Virgin Australia. In *Calder,* a California resident alleged that the defendants had published a defamatory story about her in the *National Enquirer* (the magazine's largest circulation base was in California, the forum state). 465 U.S. at 784. The defendants moved to dismiss the lawsuit for lack of personal jurisdiction due, in part, to the fact that their principal place of business was Florida. *Id*. at 784-85.

[9] To the extent that Plaintiffs claim the advertisements incorporating the photograph of Alison Chang were available online, Virgin Australia confirms that it did not place the advertisements online or otherwise make the advertisements available online. APP 2. Rather, other non parties posted the advertisements online. Even if Virgin Australia had posted the advertisements online (which it denies), this would still not be sufficient for personal jurisdiction over it in Texas. Specifically, an "advertisement in nationally circulated publications is insufficient, in itself, to subject a nonresident defendant to personal jurisdiction." *LCW Automotive Corp. v. Restivo Ent.*, 2004 U.S. Dist. LEXIS 19290, at *16-17, 04 Copy. L. Rep. (CCH) 28885 (W.D. Tex. Sept. 24, 2004) (citing *Loumar, Inc. v. Smith*, 698 F.2d 759, 763 (5th Cir. 1983)). At most, Virgin Australia's website may be considered a national circulation for Australia only, and Virgin Australia certainly did not intend to aim its website at a Texas audience. *Revell*, 317 F.3d at 475.

[10] The intentional torts alleged are invasion of privacy, libel, and copyright infringement.

The U.S. Supreme Court held that exercising personal jurisdiction over the two defendants was proper because the defendants **specifically intended** for California, the forum state, to be the "focal point both of the story and the harm suffered." *Id*. at 789. The libelous story: (1) "concerned the California activities of (2) a California resident"; (3) "impugned the professionalism…[of Shirley Jones, the plaintiff whose career] was (4) centered in California"; "was drawn from California sources, and (5) the brunt of the harm…was suffered in California." *Id*. at 788-89.

There is no such "effect" here. The allegedly libelous advertisements were not expressly aimed at Texas, nor did Virgin Australia even know that Alison Chang or Justin Wong resided in Texas. APP 3. Even if the above allegations were true (which they are not), the allegations would relate only to "the foreseeability of causing injury in Texas, which is not a 'sufficient benchmark' for specific jurisdiction." *Panda Brandywine*, 253 F.3d at 869 (citations omitted). The Fifth Circuit came to a similar conclusion in the *Revell* case. The appeals court stated that an allegedly defamatory story containing no reference to Texas (the forum state), no reference to Texas activities of the defendants, no direction towards "Texas readers as distinguished from readers in other states," and no focal point of Texas in the story failed any "effects" test under *Calder*, and supported a finding that the court lacked specific personal jurisdiction over the defendants. *Revell*, 317 F.3d at 473. The court noted that "these facts weight heavily against finding the requisite minimum contacts in this case." *Id*. at 474.

Thus, even under *Calder's* "effects" test, this Court may not exercise personal jurisdiction over Virgin Australia. *Moncrief*, 481 F.3d at 314 ("We [the Fifth Circuit] have expressly declined to allow jurisdiction for even an intentional tort where the only jurisdictional basis is the alleged harm to a Texas resident."). To allow otherwise would lead to a non-resident defendant being subjected to "jurisdiction in Texas for an intentional tort simply because the plaintiff's complaint alleged injury in Texas to Texas residents regardless of the defendant's contacts, and [defendant] would have to appear in Texas to defend the suit 'no matter how groundless or frivolous the suit may be.'" *Panda Brandywine*, 253 F.3d at 870 (citations omitted).

3. There was no breach of contract claim that would establish specific jurisdiction in Texas or the U.S.

Plaintiffs' breach of contract claim suffers the same fate as their intentional tort claims: it is insufficient to establish specific personal jurisdiction over Virgin Australia. It is black letter law that "merely contracting with a resident of Texas is not enough to establish minimum contacts." *Moncrief Oil*, 481 F.3d at 312. Moreover, if: (1) a contract does not require any performance in Texas; (2) the defendant does not perform any of his/her/its obligation in Texas; and (3) the contract is centered outside of Texas, a breach of the contract will **not** establish minimum contacts. *Id*.

A court may also consider the defendant's hub of activity in determining specific jurisdiction. If the defendant's hub of activity is not within the forum state, this factor also weighs against a court's exercise of personal jurisdiction over the defendant. *Id*. at 313. Courts also consider whether the contract contains a forum selection clause. *Id*. The Fifth Circuit gives weight to "the absence of a choice of law provision that might have given the defendant reason to believe that it could not be haled into court in the forum state." *Id*. (emphasis in original) (citing *Central Freight Lines, Inc. v. APA Transp. Corp.*, 322 F.3d 376, 383 (5th Cir. 2003)).

There is no pleading (let alone evidence) that any contract was centered in Texas - requiring Virgin Australia to perform any of its obligations in Texas - or that the hub of Virgin Australia's activity was in Texas. The Creative Commons Attribution 2.0 license has no forum selection clause, and the license does not even refer to Texas. APP 41 - 45. There was simply no foundation for Virgin Australia to believe that if it had entered into a contract with Wong, and had breached it (which Defendant denies), Virgin Australia would be subject to jurisdiction in Texas as the forum state. Rather, the opposite is true. The hub of Virgin Australia's activities was and is Australia, where it had the obligation for attribution of the Chang photograph to Wong. The photograph was never used or intended to be used in Texas. Therefore, any obligation under the license would have arisen only where the photograph was being used – in Australia. Thus, even the facts in Plaintiffs' breach of contract claim will not support a finding of specific personal jurisdiction over Virgin Australia.

C. Establishing Personal Jurisdiction Over Virgin Australia Will Offend Traditional Notions of Fair Play And Substantial Justice.

Assuming, *arguendo,* that it would be proper for the Court to exercise personal jurisdiction over Virgin Australia, doing so would not comport with "fair play and substantial justice." The Supreme Court has mandated that courts must examine the following factors when determining the reasonableness of exercising personal jurisdiction over a defendant: "[1] the burden on the defendant, [2] the interests of the forum State…[3] the plaintiff's interest in obtaining relief…[4] 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several States in furthering fundamental substantive social policies.'" *Asahi Metal Indus. v. Superior Court of Cal.,* 480 U.S. 102, 113 (1987) (quoting, in part, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). Applying these factors, the Court's exercise of personal jurisdiction over Virgin Australia would offend traditional notions of fair play and substantial justice.

The Supreme Court's analysis of the factors in *Asahi* offers compelling guidance for a finding that it would not be reasonable for the Court to exercise jurisdiction over Virgin Australia in this proceeding. In *Asahi*, the plaintiff sued the defendants over a products liability issue. *Id*. at 105-06. One of the defendants, Asahi Metal Industry Co., was a Japanese corporation, with no operations, facilities, or business in the forum state of California *Id*. at 108. The plaintiff alleged that Asahi manufactured one of the parts of the allegedly defective product in Japan. *Id*. at 106. Asahi sold this part only in Taiwan to another foreign defendant. *Id*. The district court exercised personal jurisdiction over the Japanese defendant, which the foreign defendant appealed.

In reversing the lower court's ruling, the Supreme Court held that no minimum contacts existed "such that the exercise of personal jurisdiction is consistent with fair play and substantial justice." *Asahi*, 480 U.S. at 116. First, the Supreme Court noted that the foreign defendant would be held to a severe burden if forced to submit itself to the forum state. *Id*. at 114. Asahi would have had to travel great lengths from its headquarters in Japan to California. The Supreme Court noted that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id*. Virgin Australia would also face severe burdens of having to travel a great distance from Australia to defend itself in Texas. Further, Virgin Australia is not familiar with the U.S. legal system. APP 4. Exercising personal jurisdiction over Virgin Australia in this case would result in a severe burden on the company, and would offend traditional notions of fair play and substantial justice. *See id.*

Another factor that the Supreme Court cited was that the "interests of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight." *Id*. The underlying events that formed the basis for the plaintiff's claims against Asahi all took place overseas. *Id*. The same is true regarding the Plaintiffs and Virgin Australia in this lawsuit. All of the underlying events forming the basis for the Plaintiffs' claims against Virgin Australia occurred in Australia. That is, all of the claims that the Plaintiffs allege arise from the fact that Virgin Australia used a photograph of Alison Chang in its bus shelter advertisements in Australia. This factor also necessitates the Court declining to exercise personal jurisdiction over Virgin Australia.

The fourth factor considers the judicial system's interests. The Supreme Court noted that while it was clear that the forum state had an interest in protecting its residents from defective products, it was not at all clear whether the forum state's law should apply (since all of the underlying acts occurred in Asia, *e.g.*, Asahi's components were made in Japan and sold in Taiwan). This Court should similarly consider the lack of Texas' interest in this lawsuit. While Texas may have an interest in protecting its citizens against torts alleged to have been committed against its residents, Texas law should not apply here. All of the underlying acts occurred exclusively in Australia, with no intention of their being directed towards the U.S. or Texas. Australian law should apply, if any actions occurred in Texas (which Virgin Australia denies).

Regarding the fifth factor, the *Asahi* Court considered the interest of the "several states." Finding that this factor weighed against the exercise of personal jurisdiction over the foreign defendant, the Supreme Court noted that this factor "calls for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by" the forum state. *Id*. at 115. The Court reasoned that this factor also favored no personal jurisdiction since it called for consideration of the "Federal Government's interest in its foreign relations policies," coupled with the "serious burdens on an alien defendant." *Id*.[11]

The same is true for Virgin Australia. This is not a case that calls for consideration between two or more states under the U.S. government. Rather, this case calls for careful consideration between the U.S. government's foreign policies and Australia. This factor, coupled with the serious burdens that would be placed on Virgin Australia if required to litigate this case in Texas, lead to the only logical conclusion: the Court's exercise of personal jurisdiction over Virgin Australia would offend reasonableness. "Considering the international context, the heavy burden on the alien defendant, and the slight interest of the plaintiff and the forum State, the exercise of personal jurisdiction" by a Texas court over Virgin Australia would offend the due process clause of the 14th Amendment.

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[11] "'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi*, 480 U.S. at 115 (quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting))).

Since the Court may not properly exercise general or specific jurisdiction over Virgin Australia, the Court should grant Virgin Australia's motion to dismiss in its entirety.

IV. SERVICE OF PROCESS ON VIRGIN AUSTRALIA WAS IMPROPER.

Pursuant to Fed. R. Civ. P. 12(b)(5), Virgin Australia also moves the Court to dismiss the case for insufficient service of process. The Plaintiffs originally filed the lawsuit in state court on September 19, 2007 under Case No. DC-07-11386 in the Dallas County District Court. On October 12, 2007, the Texas Secretary of State received the citation for processing and mailing to Virgin Australia. On October 18, 2007, the Texas Secretary of State mailed the original state court petition to Virgin Australia. Thereafter, on October 19, 2007, the other Defendants removed the state case to the Northern District of Texas.

Plaintiffs' service of process was not sufficient under Fed. R. Civ. P. 4(f) or Tex. Civ. Prac. & Rem. Code Ann. § 17.044(b). The defective service of process on Virgin Australia runs afoul of both federal and state law.

A. The Texas Code Does Not Allow For Substituted Service On the Texas Secretary Of State.

Substituted service on the Texas Secretary of State is governed by Tex. Civ. Prac. & Rem. Code Ann. § 17.044. It permits the Secretary of State to act as the agent for service of process "on a nonresident who engages in business in this state, but does not maintain a regular place of business in this state or a designated agent for service of process." Tex. Civ. Prac. & Rem. Code Ann. § 17.044(b). That is, the foreign defendant must be engaging in business in

Texas. *See Alternative Delivery Solutions, Ind. v. Donnelley & Sons Co.,* 2005 U.S. Dist. LEXIS 15949, at *7 (W.D. Tex. July 8, 2005) ("This argument requires an analysis of whether the Court has personal jurisdiction" over the foreign defendant.). The Court lacks personal jurisdiction over Virgin Australia because it is not engaging in business in Texas (*see supra*, section III). Accordingly, substituted service on Virgin Australia via the Texas Secretary of State was defective and insufficient under Tex. Civ. Prac. & Rem. Code Ann. § 17.044(b).

B. The Federal Rules Do Not Allow For Substituted Service On The Texas Secretary Of State Or Service By Registered Mail.

Service on a foreign corporation is governed by Fed. R. Civ. P. 4(h). Since Virgin Australia is not located within any judicial district of the United States, proper service may only be effected on Virgin Australia under Fed. R. Civ. 4(f). Australia is not a member of the Hague Convention for service of process, and the U.S. and Australia do not have any bilateral treaties. Thus, the Plaintiffs were required to effect service on a foreign corporation located in Australia under Fed. R. Civ. P. 4(f)(2). Rule 4 allows for only a limited number of options: (1) service "in a manner prescribed by the law of the foreign country for service in that country;" (2) service by letter rogatory or letter of request to the foreign authority; or (3) service by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." Fed. R. Civ. P. 4(f)(2).

First, it is undisputed that Plaintiffs did not effect service of process on Virgin Australia by letter rogatory or letter of request to the Australian courts. It is also undisputed that Plaintiffs did not effect service pursuant to Fed. R. Civ. P. 4(f)(2) because the Clerk of the Court in Texas did not serve (and Plaintiffs did not ask the Clerk to serve) Virgin Australia by mail requiring a signed receipt. Thus, Plaintiffs' sole option was: (1) in a manner prescribed by Australian law for service in that country.

To the extent that Plaintiffs argue that the ultimate delivery of the service of process was by registered mail, this still does not suffice. While registered mail is acceptable under Fed. R. Civ. P. 4(f)(2)(C)(ii), that rule still requires the service "to be addressed and dispatched by the clerk of the court to the party to be served." As noted above, the Clerk of the Court in Texas did not serve Defendant by mail requiring a signed receipt. As the Australian government has noted, service under Australian law must be effected by a "Private Agent." *See* APP 66 - 69. Since Plaintiffs did not serve Virgin Australia with process by utilizing a "Private Agent," service of process was insufficient and defective.

What Plaintiffs have effectively done, by selecting substituted service on the Texas Secretary of State, is attempt to bypass Fed. R. Civ. P. 4(f)(2). Plaintiffs have incorrectly and insufficiently served Virgin Australia under Fed. R. Civ. P. 4(e), which only applies to individuals **within** a judicial district of the United States. Virgin Australia is not within any judicial district of the United States, including this District. Therefore, substituted service on Virgin Australia via Fed. R. Civ. P. 4(e) was insufficient and defective. For the foregoing reasons, the Court must dismiss the lawsuit based on the Plaintiffs' defective service of process.

V. CONCLUSION

It is clear that Virgin Australia is not subject to personal jurisdiction anywhere in the U.S., including in Texas based on either specific or general jurisdiction. Moreover, this Court's exercise of personal jurisdiction over Virgin Australia would not comport with traditional notions of fair play and substantial justice. It is also clear that the Plaintiffs failed to properly serve Virgin Australia under federal or state law. Thus, under Fed. R. Civ. P. 12(b)(2) and (5), Virgin Australia requests that the Court grant its motion to dismiss in its entirety.

Respectfully submitted,

BAKER & McKENZIE LLP

/s/ Lisa H. Meyerhoff

Lisa H. Meyerhoff
Texas Bar No. 14000255
Email: Lisa.Meyerhoff@Bakernet.com
BAKER & McKENZIE LLP
2300 Trammell Crow Tower
2001 Ross Avenue
Dallas, TX 75201
Telephone: 214 978 3000
Facsimile: 214 978 3099

Myall S. Hawkins
Texas Bar No. 09250320
Email: Myall.Hawkins@Bakernet.com
Todd Y. Brandt
Texas Bar No. 24027051
Email: Todd.Brandt@Bakernet.com
Tan Pham
Texas Bar No. 24046628
Email: Tan.Pham@Bakernet.com
BAKER & McKENZIE LLP
711 Louisiana, Suite 3400
Houston, Texas 77002
Telephone: 713 427 5000
Facsimile: 713 427 5099

ATTORNEYS FOR DEFENDANT
VIRGIN MOBILE PTY, LTD.

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th day of December 2007, I electronically filed the foregoing “Defendant Virgin Mobile Pty, Ltd.’s Motion to Dismiss and Supporting Brief” with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

Bryant A. Fitts
Ryan H. Zehl
Fitts Zehl LLP
5065 Westheimer Rd., Suite 700
Houston, Texas 77056
Email: rzehl@fittszehl.com

/s/ Lisa H. Meyerhoff